

First Supplement to Memorandum 95-63

Marketable Title: Obsolete Restrictions (Comments of State Bar Real Property Section Members)

Attached as Exhibit pp. 1-2 is a letter from Jeff Wagner relaying comments of various members of the State Bar Real Property Section on the staff draft tentative recommendation on obsolete restrictions. The comments are discussed below.

Civil Code § 888.030 (added). Expiration of restriction

The draft provides that a restriction expires 60 years after the date a notice of intent to preserve the restriction is recorded. The State Bar notes that it is not clear who has the authority to record such a notice.

This section must be read together with the general provisions of the Marketable Record Title Act, which are attached to Memorandum 95-63. Civil Code Section 880.320 provides:

880.320. A notice of intent to preserve an interest in real property may be recorded by any of the following persons:

- (a) A person who claims the interest.
- (b) Another person acting on behalf of a claimant if the person is authorized to act on behalf of the claimant or if the claimant is one of a class whose identity cannot be established or is uncertain at the time of recording the notice of intent to preserve the interest.

The staff will add a reference to this section in the Comment.

The State Bar also suggests that the introductory clause of this section might be revised to read, "A restriction of record expires at the last ~~of the following times to occur of the following~~". The staff is not sure this is an improvement; the original proposal parallels other constructions in the Marketable Record Title Act. However, the staff does not feel strongly about this and **if the Commission thinks the State Bar formulation is clearer, we should adopt it.**

Code Civ. Proc. § 336 (amended). Five year statute of limitations

The statute of limitations for enforcement of breach of a restriction picks up the definition of "restriction" from the Marketable Record Title Act. The State Bar

is concerned about this incorporation by reference, since common interest development equitable servitudes are restrictions within the meaning of the statute, but they are not subject to expiration under the Marketable Record Title Act. **The staff has no problem with repeating the definition of “restriction” in this section in response to the State Bar concern:**

As used in this subdivision, “restriction” means a limitation on the use of real property in a deed or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other restriction.

Alternatively, and **perhaps better**, we could include a single definition of “restriction” in the general property provisions of the Civil Code defining interests in property. The general definition could then be incorporated by reference in both the Marketable Record Title Act and the statute of limitations provisions.

The statute of limitations provision requires an enforcement action within five years from the date of the breach. The State Bar is concerned about a hidden breach that does not come to light until later. They would run the statute from “the date that any party who benefits from the restriction knew or should have known about the breach”. We construe this proposal to require a single statute of limitations running from the time the first beneficiary has knowledge, and not to create a variable statute running separately as to each beneficiary based on that beneficiary’s knowledge. **The staff would implement this suggestion by providing that the statute “runs as to all persons entitled to enforce the restriction from the first date any person entitled to enforce the restriction discovers, or through the exercise of reasonable diligence should have discovered, the breach.”**

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
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Re: Obsolete Restrictions/Statute of Limitations

Dear Mr. Sterling:

I circulated a copy of the latest proposal regarding obsolete restrictions and the statute of limitations (Memorandum 95-63) to various members of the Real Property Section of The State Bar and received the following comments:

Obsolete Restrictions: It is not clear under CC § 888.030(a)(2) or (3) who has the authority to record a notice of intent to preserve a restriction. Can any property owner that benefits from the restriction record the notice, a majority, or does it take all property owners to extend the restrictions? This should be clarified.

A suggestion was made that the start of paragraph CC § 888.030(a), which reads "A restriction of record expires at the last of the following times:" be revised to read "A restriction of record expires at the last to occur of the following:".

Statute of Limitations:

(1) Applicability to Common Interest Developments: I understood at the meeting in San Francisco that the statute of limitation provisions would apply to common interest developments ("CIDs"). Under the current language, the statute applies to any breach of a restriction as defined in § 888.010. This definition includes CID restrictions; but because § 888.020 excludes CID restrictions from the chapter, are they also excluded from the definition of "restriction" under § 888.010? This needs to be clarified.

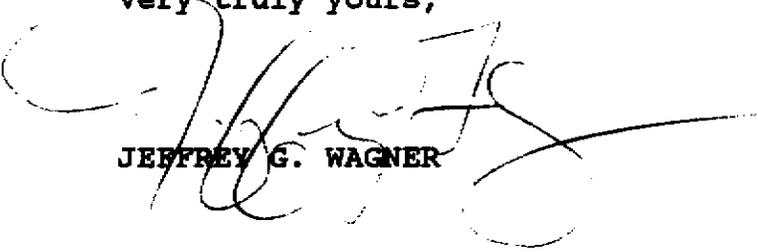
(2) Date of Breach: We recommend revising the provision to clarify when the date of breach occurs. This should be the date that any party who benefits from the restriction knew or should have known about the breach. This would address the problems

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raised by CLTA on this issue. A property owner who breaches a restriction in a manner that is not readily apparent should not be entitled to the protections of this provision.

I will not be able to attend the meeting in Sacramento on November 2, 1995. If you do have any questions regarding any of the comments, please give me a call.

Very truly yours,



JEFFREY G. WAGNER

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